Seneca Falls Foods, LLC d/b/a Seneca Falls IGA *and* United Food and Commercial Workers, Local 1.[1] Case 3–CA–26051

July 31, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

The General Counsel seeks a default judgment in this case on the ground that the Respondent has withdrawn its answer to the complaint. Upon a charge and amended charges filed by the Union on October 26 and December 6, 2006, and January 10, 2007, respectively, the General Counsel issued the complaint on February 22, 2007 against Seneca Falls Foods, LLC d/b/a Seneca Falls IGA, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. Although the Respondent filed an answer to the complaint, by letter dated April 26, 2007, the Respondent withdrew its answer.

On May 24, 2007, the General Counsel filed a Motion for Default Judgment with the National Labor Relations Board. On May 29, 2007, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer is filed by March 8, 2007, or postmarked on or before March 7, 2007, all the allegations in the complaint will be considered admitted. Although the Respondent filed an answer to the complaint, it subsequently withdrew its answer. The withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.[2]

Accordingly, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, until on or about November 4, 2006, the Respondent, a limited liability company, with an office located in Seneca Falls, New York (Respondent's Seneca Falls, New York facility), has been engaged in the operation of a retail grocery store.

Annually, until on or about November 4, 2006, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000.

During the period of time described above, the Respondent, in conducting its business operations described above, purchased and received at its Seneca Falls, New York facility products, goods, and materials valued in excess of $5000 directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that United Food and Commercial Workers, Local 1, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Michael J. Ward held the position of owner and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed at 20 East Bayard Street, Seneca Falls, New York 13148, excluding the Owner, one manager, two assistant managers, guards, professional employees and supervisors as defined in the Act, as amended.

At all material times, the Union has been designated exclusive collective-bargaining representative of the unit and has been recognized as the representative by the Respondent. This recognition has been embodied in a collective-bargaining agreement effective from August 2, 2003 to August 2, 2006.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about September 30, 2006, the Respondent failed and refused to pay accrued vacation pay to unit employees laid off on or about September 30, 2006.

[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005.

[2] See *Maislin Transport,* 274 NLRB 529 (1985).

Since about October 15, 2006, the Respondent failed and refused to make contributions to the Union's pension and health/welfare funds on behalf of unit employees.

Since about November 4, 2006, the Respondent failed to pay accrued vacation pay to unit employees laid off on or about November 4, 2006.

On about November 4, 2006, the Respondent closed its Seneca Falls, New York store.

Since about December 11, 2006, Respondent has failed to bargain with the Union, as the exclusive bargaining representative of the unit, regarding the effects of closing the Respondent's Seneca Falls, New York store.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to pay accrued vacation pay to unit employees laid off on or about September 30 and November 4, 2006, we shall order the Respondent to make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to make contributions to the Union's pension and health/welfare funds on behalf of unit employees, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).[3] We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service,* supra, with interest as prescribed in *New Horizons for the Retarded,* supra.

To remedy the Respondent's unlawful failure to give the Union prior notice of its decision to close its Seneca Falls, New York facility and an opportunity to bargain over the effects of the closure, we shall order the Respondent to bargain with the Union, on request, concerning the effects of that decision, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[4]

Thus, the Respondent shall pay its laid-off employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to close its Seneca Falls, New York facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed its facility, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less

[3] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[4] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the laid-off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent's facility is currently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Seneca Falls Foods, LLC d/b/a Seneca Falls IGA, Seneca Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally failing and refusing to pay accrued vacation pay to unit employees laid off on or about September 30 and November 4, 2006.

(b) Unilaterally failing and refusing to make contributions to the Union's pension and health/welfare funds on behalf of the unit employees.

(c) Failing to bargain collectively with United Food and Commercial Workers, Local 1, as the exclusive collective-bargaining representative of the employees in the following unit, by failing to give the Union prior notice of its decision to close its Seneca Falls, New York facility, and an opportunity to bargain over the effects of that decision on the employees in the unit. The unit is:

> All employees employed at 20 East Bayard Street, Seneca Falls, New York 13148, excluding the Owner, one manager, two assistant managers, guards, professional employees and supervisors as defined in the Act, as amended.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of its decision to close its Seneca Falls, New York facility on November 4, 2006, and to lay off its unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay to the laid-off unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(c) Make all the required contributions to the Union's pension and health/welfare funds on behalf of the employees in the unit that have not been made since October 15, 2006, in the manner set forth in the remedy section of this decision.

(d) Make whole the unit employees for any expenses ensuing from the Respondent's failure to make the required contributions, with interest, in the manner set forth in the remedy section of this decision.

(e) Make whole the unit employees laid off on or about September 30 and November 4, 2006, for any loss of earnings and other benefits attributable to the Respondent's failure to pay accrued vacation pay, with interest, in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, signed and dated copies of the attached notice marked "Appendix"[5] to the Union and to all unit employees employed at the Seneca Falls, New York facility on or after September 30, 2006.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally fail and refuse to pay accrued vacation pay to unit employees laid off on or about September 30 and November 4, 2006.

WE WILL NOT unilaterally fail and refuse to make contributions to the Union's pension and health/welfare funds on behalf of the unit employees.

WE WILL NOT fail to bargain collectively with United Food and Commercial Workers, Local 1, as the exclusive collective-bargaining representative of the employees in the following unit, by failing to give the Union prior notice of our decision to close our Seneca Falls, New York facility, and an opportunity to bargain over the effects of that decision on the employees in the unit. The unit is:

All employees employed at 20 East Bayard Street, Seneca Falls, New York 13148, excluding the Owner, one manager, two assistant managers, guards, professional employees and supervisors as defined in the Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union with respect to the effects on the unit employees of our decision to close our Seneca Falls, New York facility on November 4, 2006, and to lay off the unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay to the laid-off unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL make all the required contributions to the Union's pension and health/welfare funds on behalf of the employees in the unit that have not been made since October 15, 2006.

WE WILL make whole the unit employees for any expenses ensuing from our failure to make the required contributions, with interest.

WE WILL make whole the unit employees laid off on or about September 30 and November 4, 2006, for any loss of earnings and other benefits attributable to our failure to pay accrued vacation pay, with interest.

SENECA FALLS FOODS, LLC D/B/A SENECA FALLS IGA